[ORAL ARGUMENT NOT YET SCHEDULED]
NO. 13-5202

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MATTHEW SISSEL,
Plaintiff-Appellant,
v.
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia
Honorable Beryl A. Howell, District Judge

BRIEF OF *AMICI CURIAE* U.S. REPRESENTATIVES TRENT FRANKS, MICHELE BACHMANN, JOE BARTON, KERRY L. BENTIVOLIO, MARSHA BLACKBURN, JIM BRIDENSTINE, MO BROOKS, STEVE CHABOT, K. MICHAEL CONAWAY, JEFF DUNCAN, JOHN DUNCAN, JOHN FLEMING, BOB GIBBS, LOUIE GOHMERT, ANDY HARRIS, TIM HUELSKAMP, WALTER B. JONES, JR., STEVE KING, DOUG LAMALFA, DOUG LAMBORN, BOB LATTA, THOMAS MASSIE, MARK MEADOWS, RANDY NEUGEBAUER, STEVAN PEARCE, ROBERT PITTENGER, TREY RADEL, DAVID P. ROE, TODD ROKITA, MATT SALMON, MARK SANFORD, DAVID SCHWEIKERT, MARLIN A. STUTZMAN, LEE TERRY, TIM WALBERG, RANDY K. WEBER, SR., BRAD R. WENSTRUP, LYNE A. WESTMORELAND, ROB WITTMAN, AND TED S. YOHO, IN SUPPORT OF APPELLANT SEEKING REVERSAL

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties, Intervenors, and *Amici.*

Pursuant to District of Columbia Circuit Rule 28(a)(1), the undersigned counsel certifies that the following Congressional *amici curiae* have joined this brief:

1. Rep. Trent Franks
2. Rep. Michele Bachmann
3. Rep. Joe Barton
4. Rep. Kerry L. Bentivolio
5. Rep. Marsha Blackburn
6. Rep. Jim Bridenstine
7. Rep. Mo Brooks
8. Rep. Steve Chabot
9. Rep. K. Michael Conaway
10. Rep. Jeff Duncan
11. Rep. John Duncan
12. Rep. John Fleming
13. Rep. Bob Gibbs
14. Rep. Louie Gohmert
15. Rep. Andy Harris
16. Rep. Tim Huelskamp
17. Rep. Walter B. Jones, Jr.
18. Rep. Steve King
19. Rep. Doug LaMalfa
20. Rep. Doug Lamborn
21. Rep. Bob Latta
22. Rep. Thomas Massie
23. Rep. Mark Meadows
24. Rep. Randy Neugebauer
25. Rep. Stevan Pearce
26. Rep. Robert Pittenger
27. Rep. Trey Radel
28. Rep. David P. Roe
29. Rep. Todd Rokita
30. Rep. Matt Salmon

31. Rep. Mark Sanford
32. Rep. David Schweikert
33. Rep. Marlin A. Stutzman
34. Rep. Lee Terry
35. Rep. Tim Walberg
36. Rep. Randy K. Weber, Sr.
37. Rep. Brad R. Wenstrup
38. Rep. Lyne A. Westmoreland
39. Rep. Rob Wittman
40. Rep. Ted S. Yoho

Undersigned counsel further certifies that, to the best of his knowledge, all the parties, intervenors, and other *amici* appearing before the district court and in this court are listed in the Opening Brief of the Appellant, Matthew Sissel.

B. **Ruling Under Review.**

Undersigned counsel further certifies that, to the best of his knowledge, the ruling under review is also set forth in the Opening Brief of the Appellant, Matthew Sissel, and is incorporated by reference herein.

C. **Related Cases.**

Undersigned counsel further certifies that, to the best of his knowledge, all related cases, as defined by Circuit Rule 28(a)(1)(C), are set forth in the Brief of the Appellant, Matthew Sissel, and are incorporated by reference herein. The undersigned counsel would add that in *American Physicians & Surgeons, Inc., and Alliance for Natural Health USA v. Sebelius*, No. 13-5003 (D.C. Cir.), the counsel for Appellants in that appeal identified this appeal and *Liberty Univ., Inc. v. Lew*, No. 10-2347 (4th Cir.), as cases in which the plaintiffs-appellants seek to raise a

variant of one of the merits issues – namely, whether the Patient Protection and Affordable Care Act violated the Origination Clause of the U.S. Constitution – that American Physicians & Surgeons, Inc., and Alliance for Natural Health USA ask this Court to address in No. 13-5003.

D. **Grounds for Filing Separately.**

Undersigned counsel further certifies that the separate-brief requirement set forth in Circuit Rule 29(d) does not apply to a governmental entity.

/s/ Joseph E. Schmitz

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INTERESTS OF *AMICI CURIAE*

U.S. Representative Trent Franks is the Chairman of the House Judiciary's Subcommittee on the Constitution and Civil Justice. As chairman, Congressman Franks is the senior member of the House of Representatives specifically charged with jurisdiction over constitutional amendments, constitutional rights, and ethics in government among other issues. Along with the other 39 Members of the House of Representatives joining this brief, *amici* all serve as the immediate representatives of their constituents in the chamber most accountable to them and were constitutionally guaranteed the exclusive prerogative of introducing bills for drawing forth a national revenue under the Origination Clause, Article I, section 7, clause 1 of the U.S. Constitution. The Senate of the United States violated this constitutional safeguard when it "amended" a House bill designed to reduce taxes by substituting the legislative substance of The Patient Protection and Affordable Care Act (ACA), which was one of the largest tax increases in American history, estimated to raise $675 billion in revenue. The Origination Clause requires that such revenue raising bills originate in the House, not the Senate.

The interests of the *amici* are in protecting their constitutionally guaranteed prerogative and the separation of powers the Origination Clause was meant to ensure. *Amici* are duty bound by their oath of office to "support and defend the Constitution" and their unique positions as the exclusive trustees of the original exercise of the national taxing power.

To that end, *amici* Franks and his colleagues have co-sponsored H. Res. 153 (113th Cong., 1st Sess.) (Apr. 12, 2013) expressing the Sense of the House of Representatives that ACA "violates article I, section 7, clause 1 of the United States Constitution because it was a 'Bill for raising Revenue' that did not originate in the House or Representatives."[1]

BACKGROUND AND SUMMARY OF ARGUMENT

On October 8, 2009, the House of Representatives unanimously passed the six-page "Service Members Home Ownership Tax Act" (SMHOTA), H.R. 3590, 111th Cong. (2009), which was intended *to reduce* taxes by providing a tax credit to certain veterans who purchased homes.[2]

The Senate "amended" H.R. 3590 by deleting its entire text and substituting the 2,074 page bill which Senate Majority Leader Harry Reid referred to as the "Senate Health Care Bill,"[3] which included 17 specifically denominated revenue provisions, including the penalty or "tax" imposed on those non-exempt persons who fail to buy a government approved health insurance policy. 26 U.S.C. §5000A.[4] The Congressional Budget Office estimated that the bill would increase revenue by $486 billion between 2010 and 2019, one of the largest tax increases in

[1] *See* Addendum A.
[2] *See* Addendum B.
[3] http://www.reid.senate.gov/newsroom/111809_healthcare.cfm.
[4] *See* Pub. L. No. 111-148 §§ 1513, 9001-9017, and Addendum C for a list and description of all the "tax hikes."

American history.[5] The Senate returned the "Senate Health Care Bill" with the H.R. 3590 number affixed to it to the House, whereupon it was rushed into passage by the Democratic controlled House without a single Republican vote. On March 23, 2010, the President signed "The Patient Protection and Affordable Care Act," Pub. L. 111-148 (hereinafter "ACA").

The legal arguments in this case are straightforward. The Origination Clause of the Constitution, Article I, Section 7, clause 1, provides that "All Bills for raising Revenue shall originate in the House; but the Senate may propose or concur with Amendments as on other Bills." The "Senate Health Care Bill," which is one the largest tax increases in American history, did not originate in the House simply by virtue of keeping a House bill number. *Amici* argue in the alternative, that even if it had originated in the House, the Senate's legerdemain of substituting the SMHOTA with the Senate Health Care Bill was not constitutional for two reasons: (1) SMHOTA was not a revenue raising measure to which the Senate might amend under the second prong of the Origination Clause and (2) even if it were, the total "gut and replace" Senate amendment was not germane to the subject matter of the House bill.

The Origination Clause was a key Constitutional provision upon which the Founders insisted to protect the American people from confiscatory taxes; they

[5] *http://www.cbo.gov/publication/24998*.

reposed such power to initiate any taxes in the "People's House" to be exercised by those representatives closest to the citizens. The Origination Clause thus serves an important bulwark to protect the liberty of our citizens. If the interpretation of the Origination Clause by the court below is not reversed, that Clause will be rendered a dead letter.

ARGUMENT

I. THE ORIGINATION CLAUSE IS A PROVISION FOR THE SEPARATION OF POWERS WITHIN THE LEGISLATIVE BRANCH THAT SAFEGUARDS LIBERTY

> *"Provisions for the separation of powers within the legislative branch are . . . not different in kind from provisions concerning relations between the branches; both sets of provisions safeguard liberty."*[6]

The Origination Clause embodies a foundational principle of American jurisprudence that offers a structural constitutional protection against abuses of power by the national government. Without its guarantee in the 1787 Convention and ensuing ratification debates, our Constitution would not exist, at least not in its present form: the restriction of the Senate from originating taxes was the "cornerstone of the accommodation" of the Great Compromise of 1787 which satisfied the necessary number of states to ratify the Constitution.[7] As such, the legislation before this Court under Origination Clause challenge not only impacts

[6] *United States v. Munoz-Flores*, 495 U.S. 385, 395 (1990).
[7] Delegate Elbridge Gerry, *quoted in* James Madison, *Notes on the Debates in the Federal Convention of 1787*, at 290 (New York, Norton & Company Inc., 1969) [hereinafter Madison].

the House of Representatives' prerogatives of *amici*, but more importantly is a fundamental violation of one of America's most foundational principles: the separation of powers within a national government of limited powers and the guarantee of no taxation without representation.[8]

No American court has ever allowed taxes enacted into law in this manner and on this scale to become the law of the land.[9] Doing so now would wholly disregard and effectively nullify the plain letter and spirit of the Origination Clause. The gravity of the principle at stake, coupled with the Supreme Court's most recent Origination Clause pronouncement that the "Court has the duty to review the constitutionality of [such] congressional enactments"[10] compels this Court to reaffirm the plain guarantee in the Origination Clause that no legislative body or government official but the immediate representatives of "the People" can constitutionally originate the imposition of taxes.

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[8] The Tenth Amendment provides for a separation of powers between the national and State governments. *Amici* submit that the rich Tenth Amendment jurisprudence relied on by the Supreme Court in *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012), which struck down the Medicaid provisions by a vote of 7-2, provides a rule of construction on how this Court should interpret the Origination Clause: any ambiguities of its provisions should be interpreted in favor of protecting liberty

[9] On the contrary, the excise tax on Cotton Futures Contracts was struck down for violating the Origination Clause. *See Hubbard v. Lowe,* 226 F. 135 (S.D.N.Y. 1915).

[10] *Munoz-Flores*, 495 U.S. at 391.

A. The Origination Clause Embodies a Foundational Principle

> *"[The] distinction between legislation and taxation is essentially necessary to liberty. . . . The Commons of America, represented in their several assemblies, have ever been in possession of the exercise of this their constitutional right of giving and granting their own money. They would have been slaves if they had not enjoyed it."*[11]

Few clauses in our Constitution have such a rich and clear historical significance as the Origination Clause. With its origins in the Magna Carta, the Commons of England fought to preserve and strengthen this right for 500 years before the principle was firmly solidified by the late 17th Century in English Parliamentary custom.[12] No principle's neglect has been as responsible for undermining the legitimacy of English speaking governments as the neglect by kings, legislatures, and courts alike of the Origination principle.

To illustrate the strength of the point, consider the decapitation of King Charles I in 1649 following the 30 Years War, and the deposing of King James II following the Glorious Revolution of 1688. These dramatic acts, carried out during America's colonial period, resulted in the British Bill of Rights in the late

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[11] William Pitt, *On an Address to the Throne, in Which the Right of Taxing America is Discussed* (December, 17, 1765) (Protesting the Stamp Act on behalf of the colonists), *in* Robert Cochrane, *The Treasury of British Eloquence*, 140-41 (W.P. Nimmo, London and Edinburgh, 1877).

[12] Noel Sargent, *Bills for Raising Revenue under the Federal and State Constitutions*, 4 Minn. L. Rev. 330, 334 (1919-1920) ("In the British Parliament, in 1678, it was settled that: (1) 'all bills for purpose of taxation, *or containing clauses imposing a tax*, must originate in the House of Commons and not in the House of Lords'." (emphasis added)).

1680s, which contained one of the early iterations of the Origination Clause.[13] The principle of taxation only by the immediate representatives of the people was so firmly rooted in the English tradition, that its implementation on the American side of the Atlantic was nearly universal in colonial and early state legislatures.

Where Royal charters did not explicitly guarantee the early American colonists this prerogative, they seized it. Under the various names of "House of Delegates," "Burgesses," "Commons," or "Representatives," the colonists' lower houses – those closest to the people – were commonly vested with the exclusive right of originating taxes.[14]

Our Founders – often the same individuals who worked to draft the state constitutions with Origination Clauses – enshrined this central procedural limitation on governmental power to "originate Bills for raising Revenue" in Article 1, §7, of our current Constitution.[15]

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[13] *See* British Bill of Rights, 1 Will. & Mary, Sess. 2, c. 2., § 4 (1688)) ("That levying money for or to the use of the crown, by pretense of prerogative, without grant of parliament, for longer time, or in other manner than the same is or shall be granted, is illegal.").

[14] *See, e.g.,* "An ACT against raising of Money within this Province, without Consent of the Assembly" (1650), *reprinted in* 75 Thomas Bacon, *The Laws of Maryland* ch. XXV, 37-38 (1765).

[15] For a more detailed account of the origins of the Origination Clause, see Nicholas Schmitz & Priscilla Zotti, *The Origination Clause: Meaning, Precedent, and Theory from the 12th to 21st Century* (August 12, 2013), forthcoming in BRITISH JOURNAL OF AMERICAN LEGAL STUDIES (2014) (copy on file with undersigned counsel).

B. The Origination Clause Was a Precondition to the Ratification of the Constitution

"In short the acceptance of the plan [U.S. Constitution] will inevitably fail, if the Senate be not restrained from originating Money bills."[16]

The principle behind the Origination Clause -- sometimes phrased as "No Taxation Without Representation" -- was the moral justification for our War of Independence. With this war for freedom and liberty in mind, the Origination Clause of our Constitution was written; and without it at the core of the "Great Compromise of 1787," the 13 original States would never have agreed to ratify the Constitution.

The primary dividing issue between the delegates to the Constitutional Convention of 1787 was the question of how to resolve the method of representation in the upper chamber. The small states preferred to retain the equal representation they had enjoyed under the Articles of Confederation, while the large states wanted to shift the national legislature to a proportional representation of the American population. No disagreement threatened the success of the Convention and the new Constitution more than this one. After a month of heated debate and threats of secession, the delegates finally agreed to the Great Compromise of 1787: a bicameral legislature with equal representation of States in the upper branch, and proportional representation of the nation in the lower

[16] Madison, *supra*, at 445 (Delegate Elbridge Gerry arguing that the Convention delegates would not sign, and the states would not ratify any new federal Constitution that did not restrict the Senate from originating taxes).

branch. That Great Compromise was only made possible by agreement of both sides to restrict the upper branch from originating money bills.[17]

C. The Origination Clause Is a Substantive Structural Protection, Not an Accounting Gimmick

Our Founders were justifiably concerned that the power to raise and levy taxes should originate in the People's House, whose Members are closest to the electorate, with two-year terms.[18] The Senators, by contrast, sit unchallenged for the better part of a decade, do not proportionally represent the American population, and already enjoy their own unique and separate Senate powers intentionally divided by the Founders between the two chambers.

On an even more basic level, a Senate unrestricted from the confines of the Origination Clause would blur the fundamental separation of powers within the legislative branch. The power of the purse was unquestionably reposed in the People's House, and it has remained in that chamber throughout our history. If the Senate can introduce the largest tax increase in American history by simply peeling off the House number from a six-page unrelated bill which does not raise taxes and pasting it on the "Senate Health Care Bill," and then claim with a straight face that the resulting bill originated in the House, in explicit contravention of the supreme law of the land, then the American "rule of law" has become no rule at all.

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[17] *See id.*

[18] *The Federalist No. 52* (James Madison).

II. THE HISTORY AND PURPOSE OF THE ORIGINATION CLAUSE COMPEL THIS COURT TO CONCLUDE THAT THE MASSIVE TAXES THAT ORIGINATED AS THE "SENATE HEALTH CARE BILL" VIOLATED THE SEPARATION OF POWERS BETWEEN THE TWO CHAMBERS

Even if one views the Constitution as an evolving compact, a modern application of Origination Clause principles to today's political reality and circumstances would favor re-affirmance of the Origination Clause as a meaningful check on abuses of power. The dangers to the liberty and property of Americans from Senate transgressions of the Origination Clause are greater today for several reasons, not the least of which is that the Constitution was amended in 1913 substantially to expand Congress' power to create a federal income tax after the Supreme Court could not find that confiscatory power in the Constitution.[19] Now that the taxing power has been greatly expanded, the courts should be increasingly vigilant in applying applicable Constitutional limitations, including the Origination Clause.

At the 1787 Constitutional Convention, George Mason stated the reasons for the impropriety of Senate tax originations:

> "The Senate did not represent the *people*, but the *States* in their political character. It was improper therefore that it should tax the people. . . . Again, the Senate is not like the H. of Representatives chosen frequently and obliged to return frequently among the people. They are chosen by the Sts for 6 years, will probably settle themselves

[19] *See Pollock v. Farmers' Loan & Trust Company*, 157 U.S. 429 (1895), *aff'd on reh'g*, 158 U.S. 601 (1895).

> at the seat of Govt. will pursue schemes for their aggrandizement – will be able by weary[ing] out the H. of Reps. and taking advantage of their impatience at the close of a long Session, to extort measures for that purpose."[20]

The ratification debates confirmed this distinction, as summarized by Delegate James Wilson of Pennsylvania: "The two branches will serve as checks upon the other; they have the same legislative authorities, except in one instance. Money bills must originate in the House of Representatives."[21]

A. Despite The Direct Election Of Senators Under The Seventeenth Amendment, The Senate Does Not Represent The People In The Same Way As Does The House

Since 1789, this legal distinction between the People and the States has endured. One of the more obvious reasons for this distinction is representational equality: two Senators from Wyoming (population 570,000) should not enjoy an equal vote on new tax schemes as the two Senators from California (population 38,000,000). Contrast the Senate's staggering representational inequity to the inherent equality of the House of Representatives: the single member of the House of Representatives from Wyoming represents roughly the same number of constituents as any given member of the House of Representatives from California

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[20] Madison, *supra,* at 443 (James Madison arguing for the necessity of the clause in the Constitutional Convention on August 13, 1787).

[21] James Wilson *quoted in* "*The Pennsylvania Convention Debates*" (December 1, 1787) *reprinted in The Documentary History of the Ratification of the Constitution Digital Edition,* 451, available at http://rotunda.upress.virginia.edu/founders/RNCN [hereinafter "History"].

(approximately 550,000 constituents), and both have equal votes and voices as to the question of whether to impose a tax on each individual citizen.

The ratifying public understood the distinction between representation of the People in the House, and representation of the States in the Senate, and for this reason expressed reservations in 1787 over even granting the Senate the power to agree, amend, or refuse revenue raising bills from the House, let alone permitting the Senate to *originate* tax bills such as ACA.

Moreover, the Founders' provision of the election of Senators by State legislatures instead of the electorate ("the People") further demonstrates the Senate's representation of State's interests rather than the People's interests. To be sure, the adoption of the 17th Amendment in 1913 provided for direct election of the Senate by the people instead of state legislatures. But that method of election does not change the fundamental difference between the House and the Senate; it did not make the Senate another "People's House."

The States do not originate and have never originated national taxes. The American people retain that privilege exclusively exercised by their representatives in the House. Accordingly, the Senate cannot be the first to propose taxes such as those in ACA, a $675 billion revenue raising bill with 20 new taxes.[22]

[22] *See* Addendum C.

B. The Framers Chose The House To Originate Taxes Because The House Is Accountable To The People Every Two Years, While Senators Are Accountable Only Every Six Years

The Framers made an informed policy decision that six years is too long for federal officers to remain unaccountable for the origination of taxes. Annual elections were the standard for bodies of representative assemblies empowered to originate money bills in the founding era.[23]

Given the intensity of the debate in determining whether two-year terms were conducive to representative democracy when one-year terms were the norm, it is clear that officials who sit unchallenged for the greater part of a decade may not originate tax bills. The ratifying public was also clear that they considered it a protection of their liberty that they could frequently hold accountable public officials for tax originations:

> Who are the members that constitute this [House of Representatives] body – the *people* or their representatives? Can they do any act that they themselves are not bound by; and if they lay *excessive taxes*, the people will have it in their power to return other men (vide section 7th of 1st [Article] for the origination of *revenue bill*).[24]

It was no surprise, therefore, that in 2010 the party that did not cast a single vote in the House in favor of ACA in 2009 gained the largest seat change for a midterm election since 1938. The entire House was up for re-election. The

[23] *See* Madison, *supra,* at 457.
[24] History, *supra*, at 411 (John Smilie, *quoted in The Pennsylvania Convention Debates* (November 28, 1787).

Senate, by contrast, enjoyed having two-thirds of its members insulated from popular accountability for the measures they had passed the preceding years.

The separation of power "check" provided by the Origination Clause lets the American people know exactly who is responsible for proposing taxes and assures that these individuals are those subject to removal from office most frequently. Since the 2010 elections, the people's immediate representatives have voted some 40 times to repeal or defund ACA, but the Senators, who sit for six years unchallenged, have never agreed.[25] The Framers exact fear of taxation without adequate representation has materialized due to the complete disregard of the mandates of the Origination Clause by the U.S. Senate.

III. THE "SENATE HEALTH CARE BILL," WHICH IMPOSED THE LARGEST TAX INCREASE IN AMERICAN HISTORY, WAS INDISPUTABLY A "BILL FOR RAISING REVENUE" UNDER THE ORIGINATION CLAUSE

The lower court held that while the individual mandate "raises revenue," it was not a "Bill for raising Revenue" for purposes of the Origination Clause and that even if it were, the mandate was a proper Senate "amendment" to a Bill that originated in the House. Slip op. at 13-23. The court was wrong on both counts. *Amici* will first address in this section the issue of whether ACA was a Bill for

[25] Tom Cohen, *House GOP Launches Shutdown Battle by Voting to Defund Obamacare*, CNN (September 20, 2013) http://www.cnn.com/2013/09/20/politics/congress-spending-showdown/.

raising revenue and then address the Senate amendment provision of the Origination Clause in Part IV.

A. The "Senate Health Care Bill" Is Designed to Raise Billions in Revenue for the General Treasury

While just the individual mandate of ACA is concededly designed to raise over 36 billion dollars in revenue, the companion revenue raising provisions of ACA, ignored by the district court in her analysis, further demonstrate that the "Senate Health Care Bill" is indeed a massive $675 billion dollar revenue raising bill. *See* Addendum C.

To ignore the gross difference in scope and scale between the revenue raising nature of all the provisions that make up the "Senate Health Care Bill" and the nature of the revenue provisions in prior Origination Clause cases (which the district court conceded was "sparse") would do great violence to the Origination Clause and all future massive revenue raising bills. Given that an Origination Clause challenge against a taxing bill of this magnitude has never before been mounted, it is imperative that this Court not sanction the lower court's superficial analysis of the Origination Clause.

B. The "Purposive" Test Has No Basis in the History of the Origination Clause

The lower court narrowly focused on the preposition "for" in the Origination Clause ("Bills *for* raising Revenue") and held that for any bill that originated in the

Senate to be found in violation of the Origination Clause, the Senate had to specifically and primarily intend, expressly or impliedly, that such revenue, no matter how massive in amount, was "for" the primary purpose of raising revenue and not "for" some other or secondary purpose, regardless of the impact of such a bill on the pocketbook of American citizens. This "purposive" test has no basis in the text or constitutional history of the Origination Clause; the lower court's reliance on *United States v. Munoz-Flores*, 495 U.S. 385 (1990) to the contrary was seriously misplaced.

1. Early American Experience with Taxes

The Colonists thought that anything that taxed them at all *for any reason* was a "money bill" and therefore subject to origination restrictions.

As previously noted, all but one of the first 13 States included an Origination Clause provision in their respective constitutions, and 11 of those did not have a "purposive" test. The Massachusetts Constitution of 1780 was quite explicit and formed the basis of the imported final language of the Federal clause:

> [N]o subsidy, charge, tax, impost, or duties, ought to be established, fixed, laid, or levied, under any pretext whatsoever, without the consent of the people, or their representatives in the legislature. . . . [and] *all money-bills* shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills. [26]

[26] Mass. Const. (1780) (emphasis added).

2. Modification of the Proposed Origination Clause

More compelling evidence that the Founders intended the expansive definition of what is a revenue bill or "money bill" was the modification of the proposed Origination Clause itself.

On August 13, 1787, the Framers were debating a draft version of the Origination Clause that read "Bills for raising money *for the purpose of revenue* or for appropriating the same shall originate in the House of Representatives . . . ." Madison, *supra*, at 442 (emphasis in the original). Significantly, the final version dropped the words "for purpose of revenue." In doing so, they appeared to have decided that the term "money bills" was a synonym for "bills for raising money" without the limiting "*for the purpose of revenue"* clause. In short, the lower court created a "purposive" test without any historical basis.

Early judicial opinions further demonstrate the Founders' broad meaning of "bills for raising revenue." For example, in *United States v. James*, 26 F. Cas. 577, 578 (C.C.S.D.N.Y. 1875), the court opined:

> Certain legislative measures are unmistakably bills for raising revenue. These impose taxes upon the people, either directly or indirectly. . . . In respect to such bills it was reasonable that the immediate representatives of the taxpayers should alone have the power to originate them.

Moreover, *amici* submit that the Origination Clause should be read *in pari materia* with Article I, section 8, clause 7, the power "to lay and collect taxes, duties, imposts, and excises."

It was this "taxing power" provision upon which the *NFIB* Court upheld the penalty imposed under the individual mandate, and which prompted Chief Justice Roberts to issue this important caveat: "[e]ven if the taxing power enables Congress to impose a tax on not obtaining health insurance, any tax must still comply with other requirements in the Constitution." 132 S. Ct. at 2598. In other words, the Constitution gives Congress as a whole the "power to lay and collect taxes" (Article I, Section 8, Clause 1), but any bill laying such taxes must originate in the House of Representatives under the Origination Clause.

C. *Munoz-Flores* Does Not Support The Lower Court's "Purposive" Test With Respect To The Billions Raised Under ACA

According to the lower court's reading of the Supreme Court's 1990 decision in *Munoz-Flores*, "so long as the primary purpose of [a revenue raising] provision is something other than raising revenue, the provision is not subject to the Origination Clause." Slip op. at 13. This conclusion is erroneous.

In *Munoz-Flores*, the Court was considering a challenge to the $25 assessment levied on defendant convicted of federal immigration violation and whether that provision imposing the small assessment was a "Bill for raising revenue" under the Origination Clause. 495 U.S. at 385. The amounts so collected were to be deposited in a special Victims Fund that was capped, with residual funds, if any, to be deposited in the General Treasury.

Over the government's strong objections that the Court should not even entertain the question because to do so would raise a political question and improperly interfere with Congress's internal procedures, the Supreme Court was emphatic that the Origination Clause challenge is justiciable. *Id.* at 401. In reaching the merits, the Court concluded that the assessment provision was not a Bill for raising revenue for the General Treasury because the funds were earmarked for a special Victims Fund, and that only "incidentally" *if* there were any excess funds in the account and those were deposited in the General Treasury, that fact will not subject the assessment provision to the Origination Clause. *Id*. at 399.

The lower court seriously misconstrued the "incidental" language used in *Munoz-Flores*. The lower court interpreted "incidental" not as the Supreme Court meant, *i.e.*, residual or excess revenue in a relatively small amount that may be deposited in the Treasury; rather, the district court interpreted the word "incidental" to mean "connected with" or "related to" a legislative program that is the subject matter of the law.

Here is what the *Munoz-Flores* Court stated:

> As in *Nebeker* and *Millard*, then, the special assessment provision was passed as part of a particular program to provide money for that program -- the Crime Victims Fund. Although *any* excess was to go to the Treasury, there is no evidence that Congress contemplated the possibility of a substantial excess, nor did such an excess in fact materialize. Any revenue for the general Treasury that § 3013 creates is *thus* "incidenta[l]" to that provision's primary purpose.

495 U.S. at 399 (emphasis added).

While *amici* may take issue with the Supreme Court's conclusion that funds raised and deposited in an earmarked fund are not a bill for raising revenue, what is abundantly clear is that *Munoz-Flores* does not support the lower court's "purposive" test. Under the lower court's interpretation of *Munoz-Flores,* the Senate could have originated a bill raising billions of dollars "for the purpose of building new prisons" that would be needed because of increased incarceration caused by the Sentencing Reform Act under consideration in *Munoz-Flores* and it would not be subject to the Origination Clause, even if that revenue were deposited in the Treasury. This radical and sweeping interpretation, nowhere found in *Munoz-Flores*, would render the Origination Clause a nullity

In stark contrast to the small earmarked assessments in *Munoz-Flores,* all of the hundreds of billions to be raised by the penalty provision under the Individual Mandate and other tax provisions go directly into the Treasury. None of those funds are earmarked for a specific program in ACA. That distinction alone should suffice to demonstrate the lower court's error.

Moreover, the lower court's conclusion -- that while the revenue "may grow the government coffers," the revenue generated is "merely 'incidental' to the [individual mandate's] primary purpose" (slip op. at 15) -- also badly mangles the

Supreme Court's meaning of the word "incidental," a term which had nothing to do with the "purpose" of the Victims Fund or the "purpose" of ACA.

Accordingly, the Senate Health Care Bill, including the individual mandate's penalty provision, was a "Bill for raising Revenue" and thus satisfies the first prong on the Origination Clause**.**

IV. EVEN IF THE "SENATE HEALTH CARE BILL" ORIGINATED IN THE HOUSE, THE SENATE AMENDMENT GUTTING THE SIX-PAGE HOUSE TAX CREDIT BILL AND REPLACING IT WITH THE 2,047 PAGE ACA IMPOSING $675 BILLION IN TAXES WAS AN IMPERMISSIBLE, NONGERMANE AMENDMENT

While the court below held, incorrectly in our view, that ACA "was not a `Bill for raising Revenue'," (slip op. at 17) the court assumed it did for purposes of its analysis of the second prong of the Origination Clause: whether ACA originated in the House and whether the Senate amendment to the House bill was valid. The lower court considered this prong to be the "heart of the origination question in this case." *Id*.

A. The "Senate Health Care Bill" Originated In The Senate

Most of the *amici* were in the House of Representatives during what can only be described as the tumultuous and unconventional legislative process through which ACA originated and was enacted. In every plain English language sense of the word both today and in 1789, ACA "originated" in the Senate as Senator Reid's self-described "Senate Health Care Bill." The only part of ACA

that originated in the House was the bill number -- and chamber-specific bill designators did not even exist in the early Congresses.[27]

B. The "Senate Health Care Bill" Was Not Germane To The House Bill

While the lower court was concerned that it may be a non-justiciable question to determine the merits of whether ACA was a permissible amendment to the House bill, the court nevertheless reached the merits and concluded that the Senate amendment was germane to the House bill. The court's justiciability concerns were misplaced; the court was also wrong on the merits of the germaneness issue.

1. The Germaneness Issue is Justiciable

The lower court suggested that deciding the germaneness issue might raise a nonjusticiable political question because it would "'express a lack of respect due coordinate branches of government" regarding a "textually demonstrable constitutional commitment of [an] issue to a coordinate branch of government." Slip op. at 21 (*quoting Baker v. Carr,* 369 U.S. 186 (1962)). The court has it backwards. By not deciding the issue, the court would show a "lack of respect" to the House of Representatives and the Constitution's textual placement of the sole power to originate taxes or revenue in that body.

[27] *http://memory.loc.gov/ammem/amlaw/lwhbsb.htm*.

The district court also suggested that the House could have invoked a "blue slip" procedure questioning the germaneness of the Senate's sleight-of-hand of substituting a 2,047 page half a trillion dollar revenue raising bill for its six-page revenue-reducing bill. Slip op. at 19, n.15. Congressional amici might have had a chance to lodge that complaint through House procedures if their Democratic colleagues who controlled the House then weren't so pressured to rapidly "pass the [2,047 page] bill so that you can find out what is in it."[28] Moreover, until the *NFIB* Court decided otherwise, neither the bill's proponents nor it opponents believed that the mandate penalty was a tax. In any event, the *amici* have asserted and continue to assert their position on the issue by co-sponsoring H. Res. 153 that ACA violated the Origination Clause.

2. The "Senate Heath Care Bill" Was Not a Permissible Amendment to H.R. 3590, a Bill Providing Tax Credits To Veterans

a. *The House Bill Was Not a Bill for Raising Revenue*

SMHOTA was intended to reduce taxes by providing a tax credit to certain veterans who purchase houses. Addendum B. To demonstrate that SMHOTA also intended to raise taxes, both the lower court and Appellant Sissel mistakenly assert that SMOTA "raises income taxes on large corporations." Slip op. at 22; Sissel Br.

[28] http://blog.heritage.org/2010/03/10/video-of-the-week-we-have-to-pass-the-bill-so-you-can-find-out-what-is-in-it/). *See also Munoz-Flores* (duty of court to adjudicate an Origination Clause violation does not depend on whether the House acquiesced in it).

at 26-27 ("bill did raise corporate taxes"). As Section 6 of SMHOTA, entitled "TIME FOR PAYMENT OF CORPORATE ESTIMATE TAXES," makes clear, the corporate tax- related provision was merely a withholding modification that doesn't raise revenue or tax rates, but merely collects a small amount more than may otherwise be due, which amount may be refunded or adjusted once the corporation files its annual return.[29]

Because neither the tax credit for veterans provision nor the SMHOTA corporate tax withholding provision were "revenue raising," any argument that the Senate Health Care Bill for Origination Clause purposes was "germane" to the House bill must necessarily fail since the only "germaneness" between ACA's massive taxes and the original H.R. 3590 was the word "tax" that appeared in the House Bill. If this is all that is necessary to pass muster under the Origination Clause, the Senate could, for example, take a House bill that simply changed the due date of tax returns from April 15 to April 1 (and merely collected taxes otherwise due two weeks earlier) and gut and replace it with one of the largest tax increases in history (which describes ACA). The reasoning by the court below that would lead to such results is patently erroneous in light of both constitutional history and judicial precedent, as explained below.

[29] *See Baral v. United States,* 528 U.S. 431, 436 (2000) ("Withholding and estimated tax remittances are not taxes in their own right, but methods for collecting the income tax.").

b. ***Even If The Original H.R. 3590 Were a Bill for Raising Revenue, The "Senate Health Care Bill" Was an Impermissible Substitute Amendment To The House Bill***

Even if H.R. 3590 were originally approved by the House as a bill for raising revenue, which it was not, the conversion of that House bill into a "shell bill" by means of a total substitution of its text with the non-germane text of the "Senate Health Care Bill," was not a permissible "amendment" as our Founders understood that term. Moreover, this elevation of form over substance is contrary to how even the Senate has heretofore exercised its power to amend "Bills for raising Revenue." Any Senate amendment to a House bill that has the effect of raising revenue must be "germane to the subject-matter of the [House] bill," not just to one small provision in that bill as the lower court wrongly assumed.[30] The historical practice of determining "germaneness" as well as Supreme Court precedent does not support the lower court's novel interpretation.

The House of Representatives has always recognized the principle that the Senate may not design new tax bills. Indeed, when the Framer's wrote the Origination Clause, it was clear that the scope of permissible amendments "as on other bills" – regardless of whether or not the bill was for raising revenue -- did not include amendments that were not germane to the subject matter of the bill.[31]

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[30] *See Flint v. Stone Tracy Co*., 220 U.S. 107, 143 (1911).

[31] Asher Crosby Hinds, Parliamentary Precedents of the House of Representatives of the United States §1072 (U.S.GPO, 1899) (quoting Continental Congress rule that "No new motion or question or proposition shall be admitted under color of

This was the established standard when the Founders during the Constitutional Convention penned the words "the Senate may propose or concur with Amendments as on other Bills." In short, no non-germane substitute amendments at all were permitted in 1787 by the unicameral Continental Congress.

After the Constitution was ratified, under our newly established bicameral legislature, designed as it was to prevent creative usurpations of the House's right to "first ha[ve] and declare"[32] all new tax laws, the House insisted that any Senate amendments altering new tax measures must be germane to the subject matter of the original house revenue bill, not just that the word "tax" appears somewhere in the House bill. Indeed, this is the most direct and logical method to ensure that the Senate does not usurp the House's taxing power. The House's definition of this standard as applied to all legislative amendments has historically been quite clear and practicable:

> When, therefore, it is objected that a proposed amendment is not in order because it is not germane, the meaning of the objection is simply that it (the proposed amendment) is a motion or proposition on a subject *different from that under consideration.* This is the test of admissibility prescribed by the express language of the rule. (emphasis added).[33]

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amendment as a substitute for a [pending bill] until [the bill] is postponed or disagreed to.").

[32] *See* Laws of Maryland, *supra*, ch. XXV, 37-38 (1765).

[33] Asher Crosby Hinds, Parliamentary Precedents of the House of Representatives of the United States, §5825 (1907).

The Supreme Court in *Flint v. Stone Tracy, supra,* followed this historical practice and rule, finding that the Senate's replacement of just one clause (the inheritance tax) among hundreds of other tax provisions in the Payne Aldrich Tariff Act with a corporate excise tax of equivalent revenue raising value was "germane to the subject-matter of the [House] bill and not beyond the power of the Senate to propose." The court below ignored the context of this germaneness rule to the point of rendering it wholly meaningless. The Senate's modest and germane amendment in Flint is substantially different, both qualitatively and quantitatively, from the Senate's wholesale gut and replace of H.R. 3590 with the Senate Health Care Bill that became ACA. The two cases stand as polar opposites on any conceivable spectrum of germaneness.

The lower court misinterpreted Flint by erroneously concluding that as long as there is a revenue raising provision in the House bill, the Senate has carte blanche to originate massive new revenues as "amendments." With an understanding of the history of the germaneness rules preceding Flint, the "Senate Health Care Bill" amendment to H.R. 3590 was not "germane to" SMHOTA simply because both bills contained the word "tax."

The House has historically enforced the germaneness standard with respect to all legislative amendments, both revenue and non-revenue bills alike, since its earliest days. Moreover, the constitutional issue before this Court only concerns Senate modifications that convert a totally unrelated House measure, revenue

raising or not, to a new and massive revenue raising bill. The Constitution's Origination Clause provides the rule of legislative procedure in those cases. The internal administrative rules of either chamber cannot circumvent this requirement of the supreme law of the land.

The Senate's practice that its amendments to House bills need not be germane cannot possibly serve as the basis of the protection of the People's rights. It is totally at odds with normal Parliamentary procedure, both now and at the time that the Framers granted the Senate the power to amend "as on other bills."

This practice may be admissible in the context of non-revenue raising bills, but the Constitution expressly prohibits this mischief whenever the Senate endeavors effectively to originate taxes. In other words, with regard to the Origination Clause's allowance of the Senate to make "amendments" to House revenue bills "as on other bills," that practice must be viewed in the light of how such amendments were made to those "other Bills" at that time of the Constitution's ratification. Our Founders would not have countenanced the manner in which the "Senate Health Care Bill" was enacted.

To be sure, both Houses are free to adopt rules of procedure that liberalize the non-revenue-raising amendment process of non-revenue bills, but that liberal practice cannot be used to alter the Origination Clause's limitation on the Senate's amendment authority with respect to revenue raising bills.

In this case, any germaneness standard must mean something more -- and indeed amici submit a lot more -- than simply, as the court below put it, "that both the original House bill and the Senate amendment be revenue-raising in nature."

CONCLUSION

What is most alarming and dangerous about this case, is that the Senators knew exactly what they were doing in circumventing the Origination Clause. As explained by Senator Reid's own "Senior Health Counsel": "[B]asically, we needed a non-controversial House revenue measure to proceed to, so that is why we used the Service Members Home Ownership Tax Act. It wasn't more complicated than that."[34] From the perspective of these *amici* Members of the House of Representatives, it could not have been more contrary to the letter and spirit of the Origination Clause than that.

[34] E-mail from Kate Leone, Senior Health Counsel, Office of Sen. Harry Reid, to John Cannan (Apr. 21, 2011, 3:25 p.m.), in John Cannan, *A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History*, 105:2 LAW LIBRARY JOURNAL, 131, 153 (2013).

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BRIEF FORM CERTIFICATE

Pursuant to Rules 29(d) and 32(a) of the Federal Rules of Appellate Procedures, I certify that the attached Amici Curiae's Brief is proportionately spaced, has a typeface of Times New Roman, 14 points, and contains 6,999 words, including footnotes, but excluding this Brief Form Certificate, the Statement with Respect to Parties and *Amici,* the Table of Authorities, the Table of Contents, the Glossary, the Addenda, and the Certificate of Service. I have relied on Microsoft Word for Mac 2011's word calculation feature for the calculation.

/s/ Joseph E. Schmitz

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of November 2013, the foregoing BRIEF OF *AMICI CURIAE* U.S. REPRESENTATIVES TRENT FRANKS, MICHELE BACHMANN, JOE BARTON, KERRY L. BENTIVOLIO, MARSHA BLACKBURN, JIM BRIDENSTINE, MO BROOKS, STEVE CHABOT, K. MICHAEL CONAWAY, JEFF DUNCAN, JOHN DUNCAN, JOHN FLEMING, BOB GIBBS, LOUIE GOHMERT, ANDY HARRIS, TIM HUELSKAMP, WALTER B. JONES, JR., STEVE KING, DOUG LAMALFA, DOUG LAMBORN, BOB LATTA, THOMAS MASSIE, MARK MEADOWS, RANDY NEUGEBAUER, STEVAN PEARCE, ROBERT PITTENGER, TREY RADEL, DAVID P. ROE, TODD ROKITA, MATT SALMON, MARK SANFORD, MARLIN A. STUTZMAN, LEE TERRY, TIM WALBERG, RANDY K. WEBER, SR., BRAD R. WENSTRUP, LYNE A. WESTMORELAND, ROB WITTMAN, AND TED S. YOHO, IN SUPPORT OF APPELLANT SEEKING REVERSAL has been served via this Court's Electronic Case Filing System upon:

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